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New Jersey State Legislature

JOINT COMMITTEE ON ETHICAL STANDARDS

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July 2, 2015

Honorable Raj Mukherji
433 Palisade Ave.
Jersey City, NJ 07307

Dear Assemblyman:

You have asked a series of questions related to your potential employment as the CEO of a corporation licensed by the New Jersey Department of Health (“DOH”) as an alternative treatment center (“ATC”)¹ pursuant to the New Jersey Compassionate Use Medical Marijuana Act, *N.J.S.A. 24:6I-1 et seq.* (“CUMMA”).

I. Facts Submitted

According to the information contained in your request, as CEO you would be one of the senior ranking employees, or possibly the senior ranking employee, of the ATC. As CEO, you would report directly to the Board of Directors and communicate with the ATC’s Medical and Community Advisory Boards. Your duties would include oversight of various aspects of the ATC’s operation, including its quality control program, human services functions, information technology, and safety and security plan. You would oversee the establishment and management of strategic alliances with an acute care hospital or academic institution to pursue clinical trials or analyses of patient data to better associate certain cannabis strains,

¹ “Alternative treatment center,” as that term is used in the CUMMA, means one of the six entities that are permitted to grow and dispense medical marijuana in New Jersey. In your letter, you do not indicate the name of the alternative treatment center that may employ you. You refer to it generically as “the ATC.” This opinion adopts that terminology. Where the phrase “the ATC” is used, it refers to the particular alternative treatment center that may employ you. Where the phrase “alternative treatment center” is used, the phrase refers to alternative treatment centers generally.

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potency levels, dosages, and other characteristics with benefits for patients with serious debilitating conditions, as well as management of relationships with referring physicians and healthcare providers.

In your request, you state that, if you do not undertake employment as CEO of the ATC, you may be engaged in another capacity. The other capacity could be as an attorney, either as in-house counsel or as outside counsel through a law firm, or through the healthcare consulting firm of which you are a partner and own a controlling interest.

You state that the ATC is a nonprofit corporation organized under New Jersey law. However, you ask that the Joint Legislative Committee on Ethical Standards ("Joint Committee") consider your questions in the context of both for-profit and nonprofit employers. You state that you may also undertake a role with other out-of-State medical marijuana businesses owned or controlled by two of the ATC's principals, cofounders, and directors. You also state that, rather than being employed by the ATC directly, you may be compensated as an employee of a for-profit management company or other venture under a contract with the ATC.

You state that before becoming a legislator you were cofounder and managing partner of a consulting firm that provided registered governmental affairs and advocacy services. In that position, you advocated for the legalization of medical marijuana and represented the ATC in its successful application to the DOH for one of six permits as an alternative treatment center. Your previous consulting firm employed governmental affairs agents, and you were a governmental affairs agent until early 2013. You advise that you have completely disassociated yourself with that consulting firm and sold your 50% interest.

II. Discussion

This opinion will address each of the five questions contained in your request. Question 3 has been split into two parts. Only the ethics issues raised in those five questions are addressed herein. The opinion is heavily fact-specific. It is premised on the assumption that you have no reason to believe the potential offer of employment would be made with the intent to influence you in the performance of your official duties (as to violate *N.J.S.A. 52:13D-14* and section 2:1 of the Code) or is related to your official duties in any way (as to violate *N.J.S.A. 52:13D-24* and section 2:10 of the Code) except as provided herein. Also, please note that this opinion only relates to New Jersey legislative ethics. Having advocated for the passage of the CUMMA, you are presumably familiar with the status of state medical marijuana programs vis-à-vis federal law. *This opinion should not be construed as offering any guidance related to federal law, including the Controlled Substances Act, which prohibits the manufacture, distribution and, in certain cases, possession of marijuana.* 21

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U.S.C.A. § 841(a). Per your request, the opinion identifies where the status of the ATC as a nonprofit corporation could impact the analysis.

1) Given the close regulation and oversight of the ATC by the DOH, would the mere existence of an employment relationship with the ATC as CEO or General Counsel, or outside role with the ATC as an attorney or consultant, implicate either section 2:1a. of the Legislative Code of Ethics (“Code”) or Joint Rule 19 of the Joint Rules of the Senate and General Assembly?

The employment of a legislator with your extensive background in the healthcare field generally and also in the medical marijuana industry as the CEO or General Counsel of an alternative treatment center does not, by itself, violate section 2:1a. of the Code or Joint Rule 19. That conclusion does not change if the employment is as an attorney or consultant under a contract with an alternative treatment center. However, as set forth below in relation to your other questions, the duties of a legislator employed by an alternative treatment center or working as a contractor for an alternative treatment center may be substantially impacted by the New Jersey Conflicts of Interest Law, *N.J.S.A. 52:13D-12 et seq.*, (“Conflicts Law”) and the Code,

Section 2:1a. of the Code reads:

No member of the Legislature shall . . . act in any way that impairs the objectivity or independence of judgment of the member of the Legislature in the exercise of his or her duties or is violative of the public trust by an elected official or which creates a justifiable impression among the public that such trust is being violated.

Similarly, subsection a. of Joint Rule 19 provides that the Joint Committee may consider “allegations concerning the conduct or activities of members of the Legislature and employees of the Legislative Branch of the State Government reflecting upon the good name, integrity and reputation of the Legislature or any member thereof” These two provisions are sometimes referred to as “appearance provisions” because they may be construed to ban conduct which, though not explicitly prohibited, creates a negative appearance.

When the Legislature passed the CUMMA in 2009, it did not then, and has not in the years since, amended or supplemented the Conflicts Law or the Code to address the participation of legislators in the medical marijuana industry. It would thus appear that there

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was no express intent to create a categorical ban on legislators working in the medical marijuana industry.

The level of State regulation with respect to a given industry or profession is not necessarily determinative. Legislators have historically worked in regulated professions.²

2) Would I be permitted to interact with officials from State agencies when acting on behalf of the ATC in certain appearances on its own behalf without running afoul of any provision of the Code or law under the Joint Committee's purview?

As a legislator, you are generally prohibited from representing, appearing for or negotiating on behalf of any person or party other than the State in connection with any specific cause, proceeding, application or other matter before any State agency. *N.J.S.A. 52:13D-16* and section 2:2 of the Code generally prohibit these types of contacts between a legislator and a State agency on behalf of any entity other than the State if the legislator is receiving compensation for his or her services. There are several exceptions to this prohibition contained in subsection c. of *N.J.S.A. 52:13D-16* and section 2:4 of the Code. The applicability of these exceptions depends on the type of appearance and the State agency involved. The general exception contained in both the Conflicts Law and the Code for legislators making inquiries on behalf of constituents does not cover your case because you would be receiving compensation in exchange for your services.

In your request, you cite the Joint Committee's Formal Advisory Opinion ("FAO") 4 of 2013. FAO 4 of 2013 was in response to a specific question posed by the Legislature's Ethics Counsel concerning a legislator who "obtains the approval of the Joint Committee pursuant to *N.J.S.A. 52:13D-19* to bid on and, if successful, accept a State agency contract . . ." In your case, the Joint Committee did not grant you approval to bid on behalf of the ATC for the permit, so you should not read FAO 4 of 2013 to allow you to personally contact a State agency on behalf of the ATC.

In your request, you also mention that you may have to contact the New Jersey Department of Law and Public Safety regarding your own criminal history record background check. The successful completion of a background check is a requirement for employment with an alternative treatment center pursuant to *N.J.S.A. 24:6I-7d.(1)*. The Joint Committee

² Under section 2:7 of the Code, a legislator who engages in the conduct or practice of, or is employed in, a particular business, profession, trade or occupation which is subject to licensing or regulation by a particular State agency is required to file a notice with the Joint Committee that he or she is the holder of a particular license or is engaged or employed in such activity. A form for that purpose is attached to this opinion.

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does not view such contacts, on your own behalf, as a violation of the Conflicts Law, the Code, or Joint Rule 19, provided that you do not use your official position for any special consideration or treatment.

3) A. Should section 2:3b. of the Code be read to apply to members of the partnership, firm, or corporation other than the legislator?

This question deals with whether the ATC's other personnel could appear before a State agency on the ATC's behalf, even if you are prohibited from making such an appearance. The section you cite, 2:3b., provides that the ban on legislators appearing before State agencies contained in section 2:2 shall not "prohibit or restrict a partnership or firm with which a member of the Legislature is associated or a corporation in which he owns or controls an interest from appearing before a State agency in any cause, proceeding or other matter on its own behalf." There is a comparable exception in the Conflicts Law contained in subsection b. of *N.J.S.A. 52:13D-16*:

No . . . member of the Legislature, nor any partnership, firm or corporation in which he has an interest, nor any partner, officer or employee of any such partnership, firm or corporation, shall represent, appear for, or negotiate on behalf of, or agree to represent, appear for, or negotiate on behalf of, any person or party other than the State in connection with any cause, proceeding, application or other matter pending before any State agency. *Nothing contained herein shall be deemed to prohibit any such partnership, firm or corporation from appearing on its own behalf.* (Emphasis added.)

Under this provision, the ATC's other personnel could appear before a State agency on the ATC's behalf.

The analysis is more complicated if you are retained through an outside firm. In that scenario, the members of your outside firm would not be appearing on their own firm's behalf, but rather on behalf of the ATC. While the ATC's own personnel could still appear before a State agency in such a situation, the members of your outside law, consulting, or management firm would be disqualified from appearing on the ATC's behalf if you held an interest in the outside firm. "Interest," as used in *N.J.S.A. 52:13D-16*, is defined as follows:

"Interest" means . . . the ownership or control of more than 10% of the profits or assets of a firm, association, or partnership, or more than 10% of the stock in a corporation for profit other than

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a professional service corporation organized under the "Professional Service Corporation Act," P.L. 1969, c. 232 (C. 14A:17-1 et seq.) The provisions of this act governing the conduct of individuals are applicable to shareholders, associates or professional employees of a professional service corporation regardless of the extent or amount of their shareholder interest in such a corporation.

[*N.J.S.A.* 52:13D-13g.]

Applying this definition to your circumstances, if you are engaged through an outside consulting or management firm in which you own or control more than 10% of the profits, assets, or stock, the ban contained in *N.J.S.A.* 52:13D-16 and section 2:2 of the Code would be imputed to the other partners, officers, and employees of that firm. They would be prohibited from representing the ATC before a State agency. Similarly, if you are retained through a law firm or another firm structured as a professional service corporation, the other members of your firm would be prohibited from representing the ATC before a State agency.³

Also, if ATC personnel are representing a party other than the ATC before a State agency (such as a patient or group of patients), the imputation provisions of *N.J.S.A.* 52:13D-16 and section 2:2 of the Code would become relevant. In that case, the definition of "interest" would prevent the ATC's partners, officers, and employees from representing another party before a State agency if you owned or controlled more than 10% of the ATC's profits, assets, or stock. The corporate status of the ATC as a nonprofit corporation would be relevant in that context because if the ATC is a nonprofit, stock ownership would be eliminated as a possible ground for establishing your interest in the ATC.

3) B. Would it be acceptable for me as the CEO of the ATC to supervise, direct, advise, or participate in discussions with outside lawyers or consultants in connection with their appearance on behalf of the ATC before a State agency?

No provision of the Conflicts Law, the Code, or Joint Rule 19 directly addresses a legislator, who is also a CEO, supervising, directing, advising, or participating in discussions with the corporation's lawyers and consultants in connection with an appearance before a State agency. In some situations, such communications are permitted. For example, where the legislator is not prohibited from personally appearing before a State agency, then as CEO of a corporation he or she could communicate with the corporation's lawyers and consultants about

³ The use of the phrase "professional service corporation" in the definition of "interest" should not be read to exclude law firms organized in other corporate structures.

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their appearance. Thus, a legislator who is also a CEO could communicate with the corporation's lawyers and consultants about their appearance before any court of record or an appearance under any of the circumstances set forth in subsections a. through i. of section 2:4 of the Code. *See also N.J.S.A. 52:13D-16c.*

Similarly, a legislator is permitted to bid on State agency contracts by *N.J.S.A. 52:13D-19* and section 2:5 of the Code if he or she has obtained the pre-approval of the Joint Committee. Thus, a legislator who is also a CEO may engage in conversations with consultants and lawyers about what State government contracts the firm should bid on or how to best represent the corporation in the bidding process.

Beyond those exceptions, it is difficult to draw a precise line in this area between what is permitted and what could be construed as ethically problematic. A legislator who is also a CEO could discuss with the corporation's consultants and lawyers communications with State agencies about routine and ministerial matters concerning the operation of the ATC, but where those communications with the State agency could be construed as lobbying, a legislator's participation may become problematic. This leads into your next question.

4) Would it be acceptable for me to supervise, direct, advise, or participate in discussions with outside lawyers or lobbyists in connection with their advocacy on behalf of the ATC in connection with regulations or legislation (assuming compliance with Code section 2:11, prohibiting the use of nonpublic information acquired in the course of a member's duties for pecuniary gain⁴)?

In order to respond to this question it is necessary to understand certain terminology. Your question concerns a lobbying relationship, which implicates the Legislative and Governmental Process Activities Disclosure Act, *N.J.S.A. 52:13C-18 et seq.* ("the Act"). Under the Act, a "governmental affairs agent" is defined as:

any person who receives or agrees to receive, directly or indirectly, compensation, in money or anything of value including reimbursement of his expenses where such reimbursement exceeds \$100.00 in any three-month period, to influence legislation, to influence regulation or to influence governmental processes, or all of the above, by direct or indirect communication with, or by making or authorizing, or causing to be made or authorized, any expenditures providing a benefit to, a

⁴ Section 2:11 also prohibits the willful disclosure of certain nonpublic information whether or not for pecuniary gain.

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member of the Legislature, legislative staff, the Governor, the Lieutenant Governor, the Governor's staff, or any officer or staff member of the Executive Branch, or who holds himself out as engaging in the business of influencing legislation, regulation or governmental processes, by such means, or who incident to his regular employment engages in influencing legislation, regulation or governmental processes, by such means; provided, however, that a person shall not be deemed a governmental affairs agent who, in relation to the duties or interests of his employment or at the request or suggestion of his employer, communicates with a member of the Legislature, with legislative staff, with the Governor, with the Lieutenant Governor, with the Governor's staff, or with an officer or staff member of the Executive Branch concerning any legislation, regulation or governmental process, if such communication is an isolated, exceptional or infrequent activity in relation to the usual duties of his employment.

[*N.J.S.A. 52:13C-20g.*]

The term "lobbyist" as used in the Act means "any person, partnership, committee, association, corporation, labor union or any other organization that employs, engages or otherwise uses the services of any governmental affairs agent to influence legislation, regulation or governmental processes." *N.J.S.A. 52:13C-20d.*

Using this terminology, we assume your question is: would it be acceptable for me, as a compensated employee of the ATC (a lobbyist), to supervise, direct, advise or participate in discussions with outside lawyers or governmental affairs agents hired by my employer to influence regulation and legislation?

You are cautioned that such activity could be considered inappropriate, particularly as it relates to activities concerning the Legislature itself. Subsection a. of *N.J.S.A. 52:13D-24* provides that "[n]o. . . member of the Legislature shall. . . receive. . . any compensation. . . from any source other than the State of New Jersey, for any. . . matter related to the. . . member's official duties, except as authorized in this section."

Under the facts of your question as modified, you would receive compensation from your employer, a source other than the State of New Jersey. As part of your duties as a paid employee, you would be assisting in an attempt to influence legislation. One of your main duties as a legislator is to take part in proposing, amending and enacting legislation. None of the exceptions in *N.J.S.A. 52:13D-24* apply to the facts of your question as modified.

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Accordingly, you should not, as a member of the Legislature and an employee of a lobbyist, have direct dealings with the lobbyist's governmental affairs agents with regard to influencing legislation. Due to legislative oversight of regulations (*N.J. Const. Art. V, Sec. IV, par. 6*), discussions with your employer's governmental affairs agents with regard to influencing regulations could also present issues under this provision, but additional facts would be required in order for the Joint Committee to give you its opinion in that regard.

Your question also raises potential issues under the personal interest sections of the Conflicts Law and the Code. (These sections will be dealt with in greater detail in response to question 5 below.) Subsection a. of *N.J.S.A. 52:13D-18* provides as follows: "[n]o member of the Legislature shall participate by voting or any other action, on the floor of the General Assembly or the Senate, or in committee *or elsewhere*, in the enactment or defeat of legislation in which he has a personal interest." (Emphasis added.) Section 2:9 of the Code contains similar language. The personal interest provisions of the Conflicts Law and the Code concern not only actions on the floor and in committee, but also "elsewhere." If your interaction with the ATC's governmental affairs agents is an attempt to influence the enactment or defeat of legislation, in which you have a personal interest, such action would be prohibited.

It is also possible that dealings with your employer's governmental affairs agents with regard to attempting to influence legislation or regulation could create a justifiable impression among the public that you are violating the public trust. A legislator who is working with his or her employer's lawyers and governmental affairs agents to develop strategies to pass legislation or bring about regulatory action favorable to the employer could create a perception of a conflict between a legislator's duties to the public and his or her duties to the employer, particularly when the lobbying strategies concern matters pending within the Legislative Branch itself. The Conflicts Law and the Code are more stringent when it comes to representing other interests within one's own branch of government. See *N.J.S.A. 52:13D-16c.(9)* and Section 2:4i. (prohibiting legislators from representing local government entities before agencies within the Legislative Branch).⁵

The Election Law Enforcement Commission is charged with enforcement of the Legislative and Governmental Process Activities Disclosure Act, *N.J.S.A. 52:13C-18 et seq.* You may wish to also seek guidance from that agency concerning this aspect of your potential employment arrangement.

⁵ This opinion should not be construed as prohibiting legislators from working with lobbyists or governmental affairs agents to craft legislation where the legislator is not working on behalf of his or her employer or otherwise receiving compensation from a private party.

5) To what extent – if at all – may I participate in or vote on legislation that affects the State’s medical marijuana program or amends the CUMMA? Three specific scenarios come to mind. Would I be permitted to sponsor, participate in, or vote on legislation expanding the list of qualifying conditions for which a patient may obtain medical marijuana?

Would the Joint Committee’s answer to the foregoing question change if comprehensive legislation proposes to increase or decrease the number of ATCs permitted by the State, which has the potential to directly affect the ATC’s market share and competition?

Finally, as a member of the Budget Committee and on the floor, could I participate in, sponsor, or vote on the budget bill? (The appropriation for DOH would contain a budget for the Medical Marijuana Program, without which the ATC could not operate.)

Your questions implicate the personal interest standards in the Conflicts Law and the Code. *N.J.S.A.* 52:13D-18 of the Conflicts Law and section 2:9 of the Code prohibit a legislator from participating in the enactment or defeat of legislation in which he or she has a personal interest. The definition of “personal interest” in section 2:9 is more restrictive than the corresponding section of the Conflicts Law. Section 2:9 provides in relevant part:

For the purpose of this section a "personal interest" means the member of the Legislature, or a member of his immediate family, believes or has reason to believe he will derive a direct monetary gain or suffer a direct monetary loss by the enactment or defeat of the legislation; a "personal interest" does not mean that by enactment or defeat of the legislation no benefit or detriment could be expected to accrue to him, or to a member of his immediate family, as a member of a business, profession, occupation or group, to any greater extent than any such benefit or detriment could be expected to accrue to any other member of such business, profession, occupation or group (C.52:13D-18).

In order to have a personal interest in legislation, you would need to believe or have reason to believe that you will derive a direct monetary gain or suffer a direct monetary loss by the enactment or defeat of the legislation. That would depend on the particular legislation, your position with the ATC, and how you are paid by the ATC. And, even if you did satisfy those criteria, does the “class exception” apply? Is the ATC a member of a business, profession, occupation, or group within the meaning of the exception?

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As you point out, the medical marijuana industry in New Jersey is small. You state that only six alternative treatment centers are licensed by the State and only three of the six are presently operational. With such a small industry, it is likely the "class exception" would not apply in your case. However, it is difficult to determine with certainty whether you would have a personal interest in legislation without reviewing the specific bill or resolution in question. How you are compensated by the ATC may be relevant in determining whether the monetary gain or loss you would realize from the enactment of a particular piece of legislation would be sufficiently direct as to establish a personal interest. Thus, if you undertake employment or a contractual relationship with the ATC, you should seek guidance from the Legislature's Ethics Counsel or the Joint Committee before participating in any way in the enactment or defeat of any budget resolution proposed pursuant to Joint Rule 42 of the Joint Rules of the Senate and General Assembly specifically concerning medical marijuana or DOH's Medical Marijuana Program or any legislation to modify the CUMMA. This would include legislation to modify the list of qualifying conditions for which a patient may obtain medical marijuana or the number of alternative treatment centers.

However, it is unnecessary to abstain from participation in the enactment of the annual appropriation act simply because the bill includes a budget for the DOH's Medical Marijuana Program. As stated above, legislators have historically worked in professions regulated by the State. The Joint Committee has not interpreted a legislator's participation in a regulated profession or industry as establishing a personal interest in the bill to enact the annual appropriation act and establish the budgets for the State's regulatory agencies.

III. Conclusions

The following is a brief summary of the main points of this opinion:

1. The employment of a legislator with your extensive background in the healthcare field generally and also in the medical marijuana industry as the CEO or General Counsel of an alternative treatment center does not, by itself, violate section 2:1a. of the Code or Joint Rule 19. That conclusion does not change if the employment is as an attorney or consultant under a contract with an alternative treatment center.
2. You are prohibited from making certain contacts with State agencies on behalf of the ATC in exchange for compensation.
3. A. If you are retained by the ATC through an outside firm in which you hold an interest, this prohibition is imputed to the other partners, officers, and employees of your firm. The other personnel of the ATC, however, may contact State agencies on the ATC's behalf.

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- B. Supervising, directing, advising, or participating in discussions with the ATC's lawyers and consultants concerning their appearances before State agencies is permitted in certain cases as set forth above.
4. Supervising, directing, advising, or participating in discussions with the ATC's lawyers, consultants, and governmental affairs agents concerning legislation and their lobbying efforts before State agencies could be ethically problematic given your position as a legislator.
 5. If you are engaged in any capacity by the ATC, you should seek further guidance before participating in legislation to modify the list of qualifying conditions for which a patient may obtain medical marijuana, the number of alternative treatment centers, or any other substantive provision of the CUMMA. You should also seek further guidance before participating in any way in the enactment or defeat of any budget resolution proposed pursuant to Joint Rule 42 of the Joint Rules of the Senate and General Assembly specifically concerning medical marijuana or DOH's Medical Marijuana Program. However, it is unnecessary to abstain from participation in the enactment of the annual appropriation act simply because the bill includes a budget for the DOH's Medical Marijuana Program.

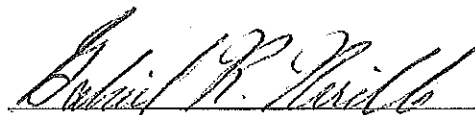
Should you require additional guidance on any issue addressed in this opinion, please do not hesitate to seek further clarification from the Joint Committee.

Very truly yours,

Joint Committee on Ethical Standards

James G. Willson
Counsel

By:



Gabriel R. Neville
Assistant Counsel

JW:N
c Marci Levin Hochman, Ethics Counsel
Attachment

TO: Joint Legislative Committee on Ethical Standards
State House Annex, Second Floor
P.O. Box 068
Trenton, New Jersey 08625-0068

SUBJECT: Legislator's Report required pursuant to section 2:7 of the
Code of Ethics

_____, a member of the New Jersey [Senate]
Name of Member

[General Assembly] reports in accordance with section 2:7 of the Code of Ethics
as follows:

Put a ✓ or X where appropriate and fill in the blank as applicable.

_____ I hold a license to practice law in the State of New Jersey.

_____ I engage in the conduct or practice of _____
(type of business,
profession, trade or
occupation)

which is subject to licensing or regulation by a State agency.

Signature of Member

Dated: